

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EDWARD PINKNEY,

Defendant-Appellee.

UNPUBLISHED
February 12, 2004

No. 243826
Berrien Circuit Court
LC No. 1999-400199-FH

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted from his 1999 conviction, following a guilty plea, for embezzlement by an agent of more than \$100 in violation of MCL 750.174. The trial court sentenced him to a term of 18 to 120 months in prison. We affirm.

The instant case stems from allegations that defendant collected insurance premiums on behalf of his former employer, Mutual of Omaha, and converted them to his own use.

Defendant first contends that the trial court abused its discretion in failing to grant his second post-sentence motion to withdraw his guilty plea, despite evidence that the prosecutor breached the plea agreement. We conclude that the issue raised by defendant is moot. As noted by the trial court, defendant does not assert his actual innocence. Rather, he only complains of a breach of his plea agreement by the prosecution. In *People v Nixten*, 183 Mich App 95, 99; 454 NW2d 160 (1990), citing *People v Johnson*, 122 Mich App 26, 29-30; 329 NW2d 520 (1982), this Court stated that where a defendant does not assert his innocence, but merely complains that the prosecution did not keep its part of the bargain, "specific performance is the appropriate remedy." Specific performance in this context consists of having the defendant resentenced so that he may obtain the benefit of his bargain. *People v Swirles*, 206 Mich App 416, 419; 522 NW2d 665 (1994). In the instant case, defendant has completed serving his sentence. Because of this, it is impossible for defendant to benefit from resentencing. "Where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot." *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Thus, we decline to review the issue.

Defendant next argues that the trial court abused its discretion in denying the motion to withdraw his guilty plea that he made before being sentenced. In arguing this issue, defendant first asserts that the trial court erred by failing to mention MCR 6.310 in its decision to deny

defendant's motion. MCR 6.310 allows a defendant to move to withdraw a plea before sentencing and "the trial court is to grant the defendant's motion 'in the interest of justice . . . unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea.'" *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). Trial courts are to make specific findings of fact and determine whether justice requires allowing withdrawal. *Id.* at 615. However, the defendant bears the initial burden of establishing a "fair and just reason for withdrawal of the plea." *Id.* at 611. Regardless of whether the trial court specifically cited MCR 6.310, it did not abuse its discretion if it examined the facts and found that defendant failed to meet this burden.

Defendant contends that the trial court decided his presentence motion under the mistaken impression that he benefited from the plea in that it prevented him from being charged with perjury. Although the trial court did mistakenly believe defendant had testified untruthfully at trial, the court did not make its decision on this basis. Rather, it found defendant's testimony at the hearing concerning his trial counsel's actions to be less than credible in light of his admission at the hearing that he had lied under oath at trial. Pursuant to *Jackson, supra* at 611, the trial court made the required factual determination, and we give "deference to the trial court's unique ability to judge the weight and credibility of the testimony" and do not substitute our judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). We refuse to allow defendant to profit from his misrepresentations by finding that the trial court erred in relying on his admission. Thus, we find no abuse of discretion.

Defendant argues that his plea was involuntary in that it was based on ineffective assistance of counsel. In *Jackson, supra* at 613, this Court stressed that "bad advice of defense counsel alone" is generally an insufficient ground for the withdrawal of a plea. In *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993), citing *In re Oakland Co Prosecutor*, 191 Mich App 113, 120-122; 477 NW2d 455 (1991), we set forth the following standard to apply in determining whether defendant received ineffective assistance of counsel in the guilty plea context.

To establish ineffective assistance in the context of a guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understandingly. The question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases.

The voluntariness of a plea may be questioned where the defendant "argues that he pled guilty due to unfulfilled promises of leniency." *People v Schirle*, 105 Mich App 381, 385; 306 NW2d 520 (1981), citing *People v Arnold*, 48 Mich App 22, 33; 209 NW2d 818 (1973). This can consist of unfulfilled promises or misleading statements by defense counsel. *Id.* But "this Court has generally rejected as a basis for reversal off-the-record promises of leniency supported only by defendant's post conviction allegations." *Id.*

In the instant case, defendant's testimony constitutes the only evidence in support of his claim that his trial counsel promised him that he would not receive a prison sentence if he pleaded guilty. Under *Schirle*, such claims are disfavored. And the trial court specifically found defendant's testimony unworthy of belief. Therefore, defendant failed to meet his burden of

establishing a fair and just reason for withdrawal of his plea as required by *Jackson* and the trial court did not abuse its discretion.

Affirmed.

/s/ Christopher M. Murray

/s/ William B. Murphy

/s/ Jane E. Markey